

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TYLER GRAY)	
Claimant)	
)	
VS.)	
)	
ACE ELECTRIC)	
Respondent)	Docket No. 1,051,273
)	
AND)	
)	
KANSAS BUILDING INDUSTRY WC FUND)	
Insurance Carrier)	

ORDER

Claimant requests review of the August 3, 2010 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

The ALJ denied claimant's request for benefits after concluding that claimant's injury did not arise out of and in the course of his employment with respondent. Specifically, that claimant was on the way home from his work duties and the benefits sought were precluded by the provisions of K.S.A. 44-508(f).

Claimant appealed this Order and asks the Board to reverse the ALJ's denial of benefits. Claimant argues that travel is an intrinsic part of claimant's work for respondent and under the applicable case law, his accident is considered compensable.¹ Respondent counters by arguing that travel was not an intrinsic part of claimant's employment with respondent as an apprentice electrician. Thus, respondent believes the Board should affirm the ALJ's Order.

¹ Claimant cites *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ____ Kan. ____ (2008).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

This Board Member finds that the ALJ's Order sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. This Member further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, this Board Member adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

It is clear from the parties' briefs and the ALJ's Order, that there is no dispute as to the underlying facts surrounding claimant's claim. Rather, it is the application of the law to those facts which are at the heart of this dispute. The legal dilemma stems from the fact that claimant was traveling home to Topeka, Kansas from his work site in Shawnee, Kansas. Claimant had worked for respondent only 6 weeks and had only one job site, the one in Shawnee, Kansas. As was his habit, claimant would ride his motorcycle to Lawrence, Kansas from his home in Topeka and meet his assigned journeyman (supervisor) and the two would proceed in a company vehicle to the job site in Shawnee, Kansas. At the conclusion of the work day, they would reverse this procedure. After being dropped off by his journeyman, claimant got on his motorcycle and was driving back to Topeka when he was struck and injured by another driver.

Claimant was not compensated for his time during this commute, nor did he have to pay for the gas in the company van. He was not required to ride with his journeyman. But the ride was provided as a courtesy as he could not afford to drive to Shawnee, Kansas on his motorcycle.

In order for a claimant to collect workers compensation benefits she must suffer from an accidental injury that arose out of and in the course of her employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.²

K. S. A. 2007 Supp. 44-508(f) provides in pertinent part:

The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee

² *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2007 Supp. 44-508(f) is seen as a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.³ In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.⁴

But K. S. A. 2007 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.⁵ Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.⁶ The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the

³ *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

⁴ *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

⁵ *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

⁶ *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

employment.⁷ This was most recently recognized by the Court of Appeals in *Halford*.⁸

After considering the evidence presented in this matter, this Board Member agrees with the ALJ's analysis and therefore affirms the ALJ's Order. Like the ALJ, this Board Member does not find that the "intrinsic travel" exception to the "going and coming rule" has any application to the facts of the case at bar. Claimant has failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with [r]espondent. Travel was not intrinsic to [c]laimant's duties as an apprentice electrician, and he had left the duties of his employment at the time of his injuries. Respondent did not require claimant to travel with the journeyman to the job site. More importantly, there is no showing in this record that travel was required in this job in any fashion other than to get to and from the job site. Claimant's claim is, therefore, barred by the "going and coming rule" of **K. S. A. 44-508(f)**. (emphasis in original)⁹ Like the claimant in *Chavez*, claimant was simply going home at the end of the work day, using his own means of conveyance on a public road. His travel on that day was not intrinsic part of his job, any more than it is part of any other commuter's job.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁰ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated, August 3, 2010, is affirmed.

⁷ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 rev. denied 235 Kan. 1042 (1984).

⁸ *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, rev. denied ___ Kan. ___ (2008).

⁹ *Chavez v. Global Advance Technology, Inc.*, No. 1,041,824, 2010 WL 1445613 (Kan. WCAB Mar. 08, 2010).

¹⁰ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of September 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Cynthia Patton, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge